Supreme Court, U.S.
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No. 02-202

IN THE

Supreme Court of the United States

D.L. CROMWELL INVESTMENTS, INC., LLOYD BEIRNE, DAVID S. DAVIDSON, ERIC S. THOMAS, AND MATTHEW GREENWALD,

Petitioners,

v.

NASD REGULATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, applying established Supreme Court precedent, erred in affirming the district court's consolidation of an evidentiary hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2), where the evidentiary hearing resolved the sole issue in litigation and the parties had adequate notice of, and consented to, consolidation.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent NASD Regulation, Inc. ("NASD Regulation") states as follows:

1. NASD Regulation is wholly owned by the National Association of Securities Dealers, Inc. ("NASD"). Both the NASD and NASD Regulation are private, not-for-profit Delaware corporations.

2. NASD Regulation has no subsidiaries.

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BRIEF IN OPPOSITION

This case involves a unanimous circuit court panel's straightforward and correct application of well-settled legal principles. Petitioners seek to have this Court review for correctness the Second Circuit's application of the agreed-upon legal standard governing the district court's consolidation of a preliminary injunction hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). The Second Circuit's holding is not at odds with the holdings of this Court or other courts. Furthermore, given the fact-specific nature of the Second Circuit holding, its decision will have no implications beyond the parties to this litigation. Accordingly, certiorari review is unwarranted.

Moreover, even if Petitioners' question presented were worthy of certiorari in the abstract—which it is not—this case is a poor vehicle for the Court to address and resolve that question. Petitioners waived their right to raise the consolidation issue on appeal when, at the conclusion of the preliminary injunction hearing, they consented to the consolidation of that hearing with a trial on the merits. *See* Pet. App. 18a.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-16a) is reported at 279 F.3d 155 (2d Cir. 2002). The opinion of the District Court (Pet. App. 17a-33a) is reported at 132 F. Supp. 2d 248 (S.D.N.Y. 2001).

JURISDICTION

The judgment of the Court of Appeals was entered on February 1, 2002. A petition for panel rehearing and rehearing en banc was denied on May 8, 2002. Pet. App. 35a-36a.

Petitioners have invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Rule 65(a)(2) of the Federal Rules of Civil Procedure provides, in pertinent part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

STATEMENT OF THE CASE

A. Factual Background

NASD Regulation is a subsidiary of the National Association of Securities Dealers, Inc. ("NASD"), a private self-regulatory organization registered with the Securities and Exchange Commission, pursuant to the Maloney Act of 1938, 15 U.S.C. § 78o-3, *et seq.*, amending the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq.* Petitioner D.L. Cromwell Investments, Inc. ("Cromwell") is a member of the NASD, and Petitioners Lloyd Beirne, David Davidson, Matthew Greenwald and Eric Thomes (miscalled "Thomas" in the petition for certiorari) are persons associated with a member of the NASD. To ensure compliance with NASD rules and related regulations, NASD Regulation conducts investigations of NASD member firms and their associated member representatives and, where warranted, commences self-regulatory disciplinary proceedings against them. In connection with an investigation of Cromwell, NASD Regulation served requests for on-the-record testimony on individual Petitioners in late 2000.

B. Proceedings In The District Court

On January 30, 2001, Petitioners filed suit against NASD Regulation in the United States District Court for the

Southern District of New York, seeking to enjoin NASD Regulation from taking on-the-record testimony from the individual Petitioners in connection with its investigation of Cromwell. Petitioners alleged that NASD Regulation, despite its private, self-regulatory status, was functioning as a "state actor" in seeking on-the-record testimony.

On February 9, 2001, the district court held a hearing on Petitioners' application for a Temporary Restraining Order ("TRO"). The district court granted a TRO, and ordered a full evidentiary hearing on Petitioners' factual allegations.

At the full evidentiary hearing on February 15, 2001, all parties were permitted to present evidence regarding the sole issue in the litigation—whether NASD Regulation, by seeking Petitioners' on-the-record testimony, had become a "state actor." NASD Regulation offered six witnesses, each of whom was cross-examined by Petitioners. Petitioners chose not to call any witnesses of their own. Furthermore, they made no request, despite a direct inquiry by the district court, to introduce evidence beyond that contained in previously introduced affidavits. *See* Pet. App. 18a; C.A. App. A-232.[1]

At the conclusion of the evidentiary hearing, and with the consent of all parties, the district court consolidated the hearing with a trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). Pet. App. 18a; C.A. App. A-232. In response to a direct inquiry from the district court as to whether they objected to consolidation, Petitioners' counsel responded that he "guess[ed] not" but that he "would like to have some closing argument." C.A. App. A-232. The district court proceeded to hear closing argument.

In a Memorandum Opinion issued on February 26, 2001 and entered on February 27, 2001, the district court held

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[1] All references to "C.A. App. __" refer to the joint appendix filed in the Second Circuit.

(consistent with ample decisional authority) that NASD Regulation was not a state actor. The court also reiterated that Petitioners had consented to consolidation. Pet. App. 18a ("The Court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction at the conclusion of which it consolidated the trial on the merits with the hearing pursuant to Rule 65(a)(2) and with the consent of the parties."). Accordingly, the court denied Petitioners' motion for preliminary injunction and, because the sole issue in the litigation now had been decided, the court proceeded to dismiss the case in its entirety. Pet. App. 17a-33a.

Petitioners subsequently filed a motion for a new trial, alleging newly discovered evidence. Holding that even if Petitioners' purported new evidence did exist that "it quite clearly would not have altered the result in this case," the district court denied Petitioners' motion for a new trial on March 12, 2001. Pet. App. 34a.

Petitioners never asked the district court to reconsider its decision to consolidate, either by filing a motion for relief from judgment pursuant to Fed. R. Civ. P. 60, or otherwise. Nor did Petitioners dispute before the district court, the district court's finding that consolidation had occurred "with the consent of the parties." Pet. App. 18a.

C. Proceedings In The Court Of Appeals

Petitioners then appealed to the Court of Appeals for the Second Circuit, and separately filed a Motion For Stay Pending Appeal to prevent NASD Regulation from taking on-the-record testimony. The Second Circuit denied that stay motion on April 24, 2001.

In their appeal, Petitioners argued that consolidation of the preliminary injunction hearing with the trial on the merits was improper because they did not receive adequate notice of consolidation from the district court. Petitioners further argued that they should have been permitted to engage in dis-

covery subsequent to the preliminary injunction hearing.[2] The Second Circuit heard oral argument on September 19, 2001. On February 1, 2002, the court affirmed the district court. *See* Pet. App. 1a-16a.

In evaluating whether the district court abused its discretion by consolidating the February 15, 2001 hearing with the trial on the merits, the Second Circuit explicitly cited and applied well-established legal doctrine, including this Court's precedent. *See* Pet. App. 9a (citing *University of Texas v. Camenisch*, 451 U.S. 390 (1981)).

The law governing the consolidation of a preliminary injunction hearing with a trial on the merits under Fed. R. Civ. P. 65(a)(2) is well-settled. Before a trial court can consolidate under Rule 65(a)(2), the parties should normally have notice of such consolidation that permits them the opportunity to present their cases. *Camenisch*, 451 U.S. at 395. Applying the notice standard endorsed in *Camenisch*, the Second Circuit held that Petitioners were "on notice [of consolidation] from the outset" of their lawsuit because the issue to be decided at the preliminary injunction hearing on February 15, 2001—NASD Regulation's status—was by Petitioners' own account the sole issue in the litigation. Pet. App. 9a. Petitioners' "complaint emphasized the . . . state actor question and that resolution of that discrete issue controlled disposition of what [Petitioners themselves] termed [a] 'very narrow' claim for injunctive relief." Pet. App. 9a (quoting Compl. 1) (emphasis omitted). The court further held that the district court provided additional notice to Cromwell, when it stated six days *before* the hearing that "[t]he issue" in

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[2] Petitioners also raised before the Second Circuit other legal arguments not contained in their petition to this Court.

the litigation "'is the state action issue.'" Pet. App. 9a (quoting Tr. 22).[3]

Although the district court's decision to consolidate is reviewed solely for abuse of discretion, *see Abraham Zion Corp. v. Lebow*, 761 F.2d, 93, 102 (2d Cir. 1985), the Second Circuit went beyond that standard and affirmatively found that "the district court *properly* consolidated the preliminary injunction hearing with a trial on the merits." Pet. App. 11a (emphasis added).

The Second Circuit did not end its analysis with its finding that Petitioners received notice of consolidation under Fed. R. Civ. P. 65(a)(2). It also applied substantial prejudice analysis. The court concluded, in the alternative, that even if Petitioners did not receive adequate notice, they nonetheless failed to demonstrate that they suffered substantial prejudice from consolidation, which is required to overturn on appeal a district court's decision to consolidate under Fed. R. Civ. P. 65(a)(2). Pet. App. 10a (citing *Abraham Zion*, 761 F.2d at 101). Specifically, the court noted that any prejudice to the Petitioners resulting from the district court's denial of their request for discovery subsequent to the preliminary hearing was their own fault. Pet. App. 10a-11a. The Second Circuit also held that Petitioners failed to demonstrate that they would have presented other evidence at the hearing had they "known" that consolidation would occur. Pet. App. 10a. The court not only determined that Petitioners did "know" that consolidation would occur, but also that discovery subsequent to the preliminary injunction hearing sought by Peti-

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[3] In their Question Presented, Petitioners twice state that the Second Circuit held that they had "constructive notice" of consolidation. The Second Circuit's opinion, however, nowhere states that Petitioners had "constructive notice," but rather that they received "notice." Pet. App. 9a.

tioners looked "very much like a fishing expedition." Pet. App. 11a.

In response to the Second Circuit panel's unanimous decision affirming the district court, Petitioners sought panel and en banc rehearing. On May 8, 2002, the panel summarily denied any rehearing, with no judge voting for en banc review. *See* Pet. App. 35a-36a.

REASONS FOR DENYING THE WRIT

This Court should deny Petitioners' writ of certiorari because Petitioners fail to demonstrate any "compelling reason[]" for this Court to grant their petition. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). Their petition instead seeks to convince this Court to review the correctness of the lower court's *application* of the proper (and settled) legal standard to the fact-bound question before the court. That is insufficient to justify this Court's review on certiorari. *Id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Petitioners implicitly concede that there is no dispute as to the appropriate legal standard, as the Second Circuit cited and applied the very cases that Petitioners argue embody the appropriate standard for consolidation pursuant to Fed. R. Civ. P. 65(a)(2). The Second Circuit engaged in the requisite analysis and presented straightforward and fact-based conclusions steeped in the record. It did not depart from this Court's decisions, and its decision did not conflict with the holdings of other circuits. Because the Second Circuit's decision is fact- and case-specific, it raises no important question of federal law and will have no implications beyond the parties to this litigation.

Furthermore, even if this Court were to determine that Petitioners' question presented is compelling in the abstract,

this case nonetheless is a poor vehicle for the Court to address and resolve issues regarding Rule 65(a)(2) consolidation. As the district court found, Petitioners consented to consolidation at the preliminary injunction hearing, thereby waiving their right of appeal on that issue.

I. There Is No Reason To Grant Certiorari

A. The Court Of Appeals Correctly Applied Established Precedent

The Second Circuit, without announcing new legal rules or departing from this Court's precedent, expressly cited and applied well-established legal standards in its review of the Rule 65(a)(2) consolidation in this case. Pet. App. 6a-10a. Accordingly, Petitioners at best allege "the misapplication of a properly stated rule of law." Rule 10 of the Rules of this Court states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Petitioners identify no reason why the Court should diverge from its Rule.

Petitioners' contention that the Second Circuit failed to apply established precedent for determining the propriety of consolidation under Fed. R. Civ. P. 65(a)(2) is meritless. Indeed, Petitioners do not dispute the fact that the Second Circuit *applied* the correct law—they merely contend that the Second Circuit erred in its application. A comparison of Petitioners' brief with the Second Circuit's opinion demonstrates that, by Petitioners' own account, the Second Circuit undeniably identified, considered, and applied the correct legal standards.

First, Petitioners argue that the Second Circuit departed from established precedent in its review of whether they received adequate notice of consolidation. Pet. 10. That argument is defeated by the Second Circuit's indisputable application of the correct legal standard. Petitioners quote *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981), for

the proposition that consolidation of a preliminary injunction hearing with a trial on the merits cannot occur without "clear and unambiguous notice [of the Court's intent to consolidate the trial and the hearing] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." Pet. 5 (internal quotations and emphasis omitted).

The legal standard for notice contained in the Second Circuit's opinion is identical to the standard endorsed by Petitioners. The Second Circuit cited, considered and applied *Camenisch*, 451 U.S. at 395. Quoting the same language from *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F.2d 1055, 1057 (7th Cir. 1972), that this Court quoted in *Camenisch*, 451 U.S. at 395, the Second Circuit stated that consolidation may occur "only after the parties . . . receive clear and unambiguous notice [of the court's intent to consolidate] either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases." Pet. App. 9a (internal quotations omitted).

Applying the agreed-upon legal standard endorsed by this Court, the Second Circuit then determined that (a) Petitioners were on notice of consolidation "from the outset" because their self-described "very narrow" claim for injunctive relief "hinged on the issue to be decided at the preliminary hearing"—NASD Regulation's status—and (b) Petitioners had received "additional notice" from the district court, which announced six days *before* the evidentiary hearing that "the issue is the state action issue; essentially whether these [on-the-record interview] requests are fairly attributable to the government." Pet. App. 9a (internal quotations omitted).

Second, Petitioners rely upon *Pughsley*, 463 F.2d at 1055, cited favorably by this Court in *Camenisch* as noted above, to argue that the Second Circuit erred in its review of consolidation in light of Petitioners' request to engage in dis-

covery after the February 15, 2001 evidentiary hearing. Pet. 5-9. Although the question of discovery is mooted by the Second Circuit's finding that adequate notice existed, the Second Circuit nonetheless addressed the propriety of the district court's denial of Petitioners' discovery request.

Indeed, the Second Circuit cited, considered and applied *Pughsley* to articulate the general notice standard required for consolidation, Pet. App. 9a, and to analyze the propriety of consolidation in a hypothetical context that assumed insufficient notice. Pet. App. 10a. Nowhere in its analysis did the Second Circuit criticize or limit *Pughsley*.

Third, Petitioners cite other circuit court opinions in an unpersuasive effort to demonstrate that the Second Circuit departed from established precedent. They cite *Woe v. Cuomo*, 801 F.2d 627 (2d Cir. 1986), and *Gellman v. Maryland*, 538 F.2d 603 (4th Cir. 1976), to argue that the Second Circuit applied incorrect standards for adjudicating the propriety of consolidation. Yet again, Petitioners' argument is disproved by a review of the Second Circuit opinion.

The Second Circuit cited, considered, and applied *Woe*. *See* Pet. App. 9a-10a. And, although it did not cite *Gellman* explicitly, both the Second Circuit here and the Fourth Circuit in *Gellman* applied the same *Pughsley* standard. Pet. App. 9a-10a (citing *Pughsley*); *Gellman*, 538 F.2d at 604 (same).

As demonstrated above, there is no real dispute that the Second Circuit applied the appropriate standard to review the district court's consolidation of the preliminary injunction hearing with the trial on the merits. Each of the cases on which Petitioners primarily rely—*Camenisch*, *Pughsley*, and *Woe*—was applied by the Second Circuit. Petitioners simply disagree with the *result* of the Second Circuit's application of that agreed-upon standard to the record before it. Accordingly, Petitioners' request for a writ of certiorari is in fact an effort to convince this Court to review the correctness of the

Second Circuit's application of established precedent. A grant of certiorari to review a "misapplication of a properly stated rule of law," however, is not warranted in this case, where the Second Circuit issued a well-reasoned, inevitably fact-based opinion. Sup. Ct. R. 10.

B. The Court Of Appeals' Decision Is Not In Conflict With Other Appellate Decisions

In an attempt to create a "compelling reason" for this Court to grant certiorari review, Petitioners also argue that the Second Circuit's decision in this case conflicts with other court of appeals decisions, both within and outside of the Second Circuit. Again, Petitioners' argument is defeated by the Second Circuit's application of well-settled law, and any differences in result among appellate decisions is appropriately attributable to the application of the same legal standard to different factual situations.

Petitioners cite several Second Circuit cases that they argue conflict with the court's decision in this case. Specifically, Petitioners argue that the "Second Circuit . . . departed from established [Second Circuit] precedent when it concluded that the plaintiffs ultimately could not establish [the requisite] prejudice [needed to overturn consolidation] due to the inadequate notice of consolidation." Pet. 11-13 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638 (2d Cir. 1998); *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 101 (2d Cir. 1985); *Reese Publ'g Co. v. Hampton Int'l Communications, Inc.*, 620 F.2d 7 (2d Cir. 1980); *Johnson v. White*, 528 F.2d 1228 (2d Cir. 1975)). But, once again, this argument is meritless. The court expressly adhered to Second Circuit precedent. In fact, it cited and applied each of the above-cited Second Circuit decisions in the process of reaching its decision that, even assuming a lack of requisite notice, Peti-

tioners failed to demonstrate substantial prejudice. Pet. App. 10a.[4]

Petitioners further contend that the Second Circuit's decision is in conflict with decisions of other courts of appeals because those courts—in applying the same legal standards—reached different outcomes in different cases. *See* Pet. 5-13; *see also supra* Part I.A. Specifically, Petitioners argue that several other courts have overturned Rule 65(a)(2) consolidation, where "notice of consolidation of a preliminary injunction with a trial on the merits is *not given prior to* rendering a decision on the merits." Pet. 5 (emphasis added) (citing cases). But those cases are entirely consistent with the Second Circuit's ruling in this case. Pet. App. 9a. Where, as here, notice of consolidation of a preliminary injunction with a trial on the merits *is* given prior to a district court rendering a decision on the merits, consolidation is permissible.

Because any determination as to whether proper notice existed for consolidation is fact-specific, the Second Circuit's decision cannot reasonably be said to conflict with the decisions of other circuit courts of appeals, which applied the same legal principles as the Second Circuit to different sets of facts. Courts of appeals in cases overturning consolidation confronted factual records where, by Petitioners' own ac-

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[4] Furthermore, even if the Second Circuit had ignored these other Second Circuit decisions and their articulated standards for determining whether a party is "prejudiced" by unnoticed consolidation, certiorari review would still not be warranted. An intra-circuit conflict is not akin to the "compelling" conflicts that warrant review by this Court. *See* Sup. Ct. R. 10(a) (recognizing a conflict between circuits, but not within the same circuit, as a "compelling reason" warranting certiorari review). Moreover, no judge on the Second Circuit voted for en banc review, Pet. App. 36a, suggesting that the Second Circuit judges themselves perceived no departure from Second Circuit precedent.

count, "notice of consolidation of a preliminary injunction with a trial on the merits [was] not given prior to a decision on the merits." Pet. 5. The Second Circuit confronted a different, unique factual record—from the time of Petitioners' Complaint, the state actor question was the sole litigation issue; the district court informed Petitioners six days before the hearing that court viewed the state actor issue to be "the issue" in the case; Petitioners knowingly rested on their affidavits at the close of the hearing; Petitioners consented to consolidation; and the purported new evidence that Petitioners claimed would result from subsequent discovery would not have changed the ultimate outcome. *See* Pet. App. 9a-10a, 18a.

There is no merit to Petitioners' hypothesis that review is appropriate where two courts—both applying the same legal standards—reach opposite outcomes due to the different, distinct factual records before the courts. Quite the contrary, the Court's Rules state that certiorari review is not warranted in such cases. *See* Sup. Ct. R. 10.

C. The Court of Appeals' Decision Is Fact-Bound

As demonstrated above, Petitioners do not challenge the legal rules applied by the Second Circuit, but rather the specific application of those rules to the Rule 65(a)(2) consolidation in this case. Petitioners essentially, and unconvincingly, quibble with the Second Circuit's record-based findings that (a) Petitioners had adequate notice of consolidation, and (b) even if Petitioners did not have adequate notice of consolidation, they failed to demonstrate sufficient prejudice to warrant the overturning of the district court's decision to consolidate. This Court only rarely grants a petition for a writ of certiorari "when the asserted error consists of erroneous factual findings," Sup. Ct. R. 10, and there is no reason for this Court to depart from its Rule in this case.

Furthermore, the manner in which the courts below applied Fed. R. Civ. P. 65(a)(2) consolidation case law to this one fact-specific case is not significant. This case raises no important questions of federal law and, as discussed above, this Court previously has authoritatively addressed Fed. R. Civ. P. 65(a)'s notice requirement. *See Camenisch*, 451 U.S. at 395; Sup. Ct. R. 10(c) (stating that *unsettled* questions of federal law are a basis for granting certiorari). Because courts confront different sets of facts when evaluating the propriety of consolidation under Fed. R. Civ. P. 65(a)(2), this case has no implications beyond the parties to the litigation.

II. Petitioners Consented To Consolidation, Waiving Their Right To Raise That Issue On Appeal

As set forth above, a grant of certiorari is not appropriate because the petition in question is not compelling. If this Court were to determine, however, that the question presented is compelling in the abstract, this case nonetheless is a poor vehicle for the Court to address and resolve that question. The factual record demonstrates that, at the conclusion of the preliminary injunction hearing, Petitioners consented to and thereby waived their right to object to consolidation. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (discussing the Court's waiver jurisprudence).

Before the district court, Petitioners admitted that their case contained no issues beyond the preliminary injunction issue—whether NASD Regulation was a state actor—and, after initially requesting discovery subsequent to the hearing, ultimately responded in the negative when directly asked by the district court judge whether they objected to consolidation without an opportunity for the future presentation of evidence. Pet. App. 18a ("The Court held an evidentiary hearing on plaintiffs' motion for a preliminary injunction at the conclusion of which it consolidated the trial on the merits with the hearing pursuant to Rule 65(a)(2) *and with the con-*

sent of the parties.") (emphasis added); C.A. App. A-231-32, Tr. 115-17.

Petitioners' consent and accompanying waiver of their right to object to consolidation is demonstrated by the following colloquy between the district court and Petitioners' counsel at the February 15, 2001 evidentiary hearing:

THE COURT:

> Any other evidence to present?

COUNSEL FOR NASD REGULATION INC:

> No, your Honor.

COUNSEL FOR PETITIONERS:

> Assuming that my clients' affidavits with regard to their allegations are sufficient, unless you want to hear evidence from them.

THE COURT:

> That raises an interesting question. *The whole ballgame is the preliminary injunction*?

COUNSEL FOR PETITIONERS:

> *That's correct . . . .*

THE COURT:

> *[S]o how is there anything left after the preliminary injunction?*

COUNSEL FOR PETITIONERS:

> *I guess that there isn't.*

THE COURT:

> So I will consolidate, and I will take your clients' affidavits, and there we are. Any objection?

COUNSEL FOR PETITIONERS:

> I had not thought about this before, *but I guess not.* What I would like to do is, I would like to have some closing argument.

C.A. App. A-231-32, Tr. 115-17 (emphases added).

Any future review by this Court of the merits of this case would require an analysis of consent and waiver. Based on the record above and the district court judge's statement in his Memorandum Opinion that all parties consented to consolidation, Pet. App. 18a, a finding of consent and waiver would be likely.[5] Accordingly, in addition to offering no reason for this Court to grant certiorari, this case is a poor vehicle for the Court to resolve any issues related to Fed. R. Civ. P. 65(a)(2).

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[5] The Second Circuit did not address NASD Regulation's consent argument in its opinion. The Second Circuit stated, in setting forth the facts, that consolidation occurred "over Cromwell's objection." Pet. App. 2a. It is unclear whether the court was referring only to Petitioners' post-hearing attempt to seek additional discovery, but in any event the court's passing remark is not supported by the record, as demonstrated above. *See also* Sup. Ct. R. 15.2.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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